U.S. Department of Labor

Office of Administrative Law Judges
2 Executive Campus, Suite 450
Cherry Hill, NJ 08002

(856) 486-3800
(856) 486-3806 (FAX)

Issue Date: 10 March 2006

Case No.: 2005-BLA-05885

In the Matter of

CHARLES D. MULLINS
Claimant

v.

BURLESON & MULLINS COAL, INC.
Employer

and

AMERICAN MINING INSURANCE COMPANY
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Charles D. Mullins
Pro Se

Thomas J. Skinner, IV, Esquire
For Employer/Carrier

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

[1] The regulations cited are the amended regulations that became effective on January 19, 2001. 20 C.F.R. Parts 718 and 725.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

On May 20, 2005, this case was referred to the Office of Administrative Law Judges for a formal hearing. Subsequently, the case was assigned to me. The hearing was held before me in Birmingham, Alabama, on October 20, 2005, where the parties had full opportunity to present evidence and argument. Claimant did not file a brief. Burleson & Mullins Coal Co. ("Employer" or "B& M") filed a brief on December 23, 2005. The decision that follows is based upon an analysis of the record, the arguments of the parties, and the applicable law.

I. ISSUES

The following issues are presented for adjudication:

(1) whether Employer/Carrier is the responsible coal mine operator;[2]

(2) the length of Claimant's coal mine employment history;

(3) whether Claimant has pneumoconiosis;

(4) whether Claimant's pneumoconiosis arose out of his coal mine employment;

(5) whether Claimant is totally disabled; and

(6) whether Claimant's total disability is due to pneumoconiosis.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Claimant filed this claim for benefits on April 23, 2003. (DX 2)[3] On October 27, 2004, the District Director denied the claim finding Claimant had failed to establish any of the

[2] Employer/Carrier filed a motion on August 18, 2005, requesting that the issue of responsible operator be added as a contested issue. In support of its motion, Employer/Carrier stated that the issue of responsible operator had been previously raised at the District Director level and that Employer/Carrier had submitted interrogatory answers and a deposition transcript with exhibits in support of its position that Employer/Carrier was not the responsible operator and carrier, respectively. At the hearing on October 20, 2005, Employer/Carrier again requested that the responsible operator issue be added as a contested issue. Again, Employer/Carrier stated that the issue had already been raised at the District Director level and referred to its filing of August 18, 2005. (T 7-11) Based on the above, I granted Employer/Carrier's motion and added the issue of responsible operator as an issue in controversy.

elements of entitlement. (DX 34) Claimant filed a request for reconsideration on November 16, 2004. (DX 35) On March 21, 2005, the District Director denied the request for reconsideration. (DX 37) Claimant requested a formal hearing on April 1, 2005. (DX 38)

B. Factual Background

Claimant was born on May 6, 1941. (DX 2; T 11) He married Martha Guthrie on October 18, 1988, and she is his only dependent for purposes of augmentation of benefits. (DX 9) Claimant provided testimony at the hearing and at a deposition on April 6, 2004, regarding his previous coal mine employment.

Claimant testified that his first coal mine employment was working for his father hauling coal out of a strip pit from 1962 through 1964. (T 11-12; DX 5 at 7-8) His next coal mine employment was as an owner/operator of A-1 Coal Company. He worked at A-1 Coal Company from 1974 to 1978. (T 13; DX 5 at 8) Claimant testified that he worked for B&M, his own company, from 1978 to 1989. (T 14, DX 5 at 9) During the time he worked for B&M Claimant worked in the coal yard crushing and blending coal. (T 15, DX 5 at 9, 22) Claimant closed B&M in 1990. (DX 5 at 9) Claimant's wife started Mira Enterprises, Inc. (Mira), a coal broking company, and Claimant began working there in 1990. (T 15; DX 5 at 9) Claimant continued to work for Mira until 2004. (T 15) While working at Mira, Claimant did much of the same work he did at B&M, running a loader and the crusher at the coal screening plant. (T 15-17; DX 5 at 14-15, 19)

Presently, Claimant complains of trouble breathing. Claimant is only able to walk "a couple of hundred yards" due to shortness of breath. Claimant has been treating with Dr. Long for three or four years and was prescribed breathing treatments. (T 21-24)

C. Relevant Medical Evidence

Claimant submitted the treatment records of Dr. Dick Owens dated from March 17, 1999 through September 12, 2001. The physician's March 17, 1999 treatment record states that Claimant "had pneumonia in hospital/had underlying fibrosis." Dr. Owens diagnosed Claimant with pneumonia and chronic obstructive pulmonary disease. The majority of the physician's treatment records relate to Claimant's left arm pain. However, Dr. Owens repeatedly diagnosed Claimant with chronic obstructive pulmonary disease and hypertension. (DX 12)

Claimant also submitted the medical records from Carraway Burdick West Medical Center. In a chest X-ray report dated March 9, 1999, Dr. Scott Loveless noted that Claimant had a history of cough and shortness of breath. On the chest X-ray, Dr. Loveless noted hyperinflation that was compatible with chronic obstructive pulmonary disease. Dr. Loveless found patchy, reticular nodular densities in Claimant's right upper chest that he opined could be early pneumonia. In a chest X-ray report dated March 10, 1999, Dr. Randall Finley noted that Claimant had a history of shortness of breath and was following-up on the appearance of right

[3] The following abbreviations are used herein: "CX" refers to Claimant's Exhibits; "DX" refers to Director's Exhibits; "EX" refers to Employer's Exhibits; and "T" refers to the transcript of the October 20, 2005 hearing.

upper lung infiltrate. On the chest X-ray, Dr. Finley found Claimant's lungs were hyper-expanded consistent with emphysema. Dr. Finley also found patchy focal densities in the right upper lung that he opined could represent a limited air space disease such as pneumonitis or localized fibrosis. Dr. Finley also noted a small calcified granuloma anteriorly in Claimant's left upper lung lobe. (DX 12)

Claimant's medical records include a chest X-ray report by Dr. Ken Venexan dated April 30, 1999. The physician found Claimant's lungs were hyperaerated but clear. Dr. Venexan noted that the previous upper lung lobe opacity found on the March 10, 1999 chest X-ray had cleared. Dr. Venexan concluded that the chest X-ray showed chronic obstructive pulmonary disease changes. (DX 12)

Claimant's medical records also include a chest X-ray report by Dr. Robert Rausch dated February 26, 2001. The physician noted that Claimant had complained of chest pain angina and the chest X-ray was being performed to rule out a myocardial infarction. Dr. Rausch compared the current chest X-ray to a previous one dated April 30, 1999. The physician found that Claimant's lungs were clear although emphysematous changes were present. Dr. Rausch also found mild interstitial fibrosis in the left lower lung lobe. The physician concluded that the chest X-ray showed chronic pulmonary changes but that no active disease was present. (DX 12)

Lastly, Claimant's medical records include a report of an abdominal CT scan by Dr. Beth Weatherford dated March 1, 2001. The physician noted that Claimant's lung bases were clear. Dr. Weatherford also noted that no definite abnormal masses or abnormal fluid collections were present. The physician did find some mild degenerative and atherosclerotic changes of Claimant's aorta. Dr. Weatherford concluded that the CT of Claimant's abdomen showed arteriosclerotic cardiovascular disease and degenerative joint disease but was otherwise negative. (DX 12)

D. Responsible Coal Mine Operator Designation

Employer/Carrier contends that Employer is not the responsible coal mine operator liable for benefits. Employer admits that it did employ the miner; however, it maintains that it is not the last coal mine operator capable of paying benefits to employ the miner. (Emp. Br. at 7-8) Carrier further argues that even if Employer is found to be the responsible coal mine operator, it should not be held to be the responsible carrier as the company did not have a policy in effect at any time while Claimant was employed by Employer. (Emp. Br. at 7-10)

A coal mine operator is liable for payment of benefits when the miner's last coal mine employment with the operator occurred after January 1, 1970. § 725.490(a). The Director bears the burden of investigating and assessing liability against the proper coal mine operator. England v. Island Creek Coal Co., 17 B.L.R. 1-141 (1993). The Director asserts that B&M is the responsible operator as Mira does not qualify as a coal mine operator under § 725.491 and B&M accepted liability. (Dir.'s Br. at 4-7) Additionally, the Director asserts that Carrier, American Mining Insurance Company (American Mining), is the responsible carrier as it failed to contest its status as the responsible carrier. (Dir.'s Br. at 5, 8-9)

Under the regulations, the coal mine operator which last employed the miner and meets the regulatory requirements and is financially able to pay benefits is determined to be the proper coal mine operator that is liable for payment of benefits. See Cole v. East Kentucky Collieries, 20 B.L.R. 1-51 (1996). The first regulatory requirement is that the miner's disability must have arisen, at least in part, out of his employment with the operator. § 725.494(a)(1); § 725.495(a)(1). In making this determination, there is a rebuttable presumption that the miner was "regularly and continuously exposed to coal dust during the course of employment." § 725.491(d). The presumption can be rebutted by a showing that the miner was not exposed to coal mine dust "for significant periods" during his employment. Id.; Conley v. Roberts and Schaefer Coal Co., 7 B.L.R. 1-309, 1-312 (1984). The additional regulatory requirements are that Employer was an operator after June 20, 1973; that Claimant worked for Employer for a cumulative period of at least one year; that Claimant worked for at least one day after December 31, 1969; and that the operator is capable of assuming liability for the payment of benefits. § 725.494(b)-(e). Absent evidence to the contrary, an operator will be considered capable of assuming liability for the payment of benefits. § 725.495(b).

The Director argues that Mira, where Claimant worked subsequent to working for Employer, does not qualify as a potentially liable operator as the company operated as a coal broker and was not involved in the extraction or processing of coal. § 725.491. The Director further argues that Mira does not qualify as a potentially liable operator because, as of Claimant's last date of employment with the company, it was not covered by a policy of insurance, was not approved to self-insure its liability, nor did it possess sufficient assets to secure payment of benefits. Although in his testimony Claimant stated he was involved in surface mining and coal preparation, I find I do not need to address whether Mira was a coal mine operator under § 725.491 because the evidence is sufficient to establish that Mira does not qualify as a potentially liable operator under § 725.494 as it is not capable of assuming liability for the payment of benefits. Both Claimant and his wife testified that Mira is no longer a viable company and has no assets. (T 17, 29, 30-31; DX 28) In a letter to the Department of Labor dated December 8, 2003, Mrs. Mullins stated that Mira never had workers' compensation insurance. (DX 19) Further, the Director filed a statement under § 725.495(d) stating that Mira was not designated the responsible operator because it was neither covered by a policy of insurance nor approved to self-insure its liability on the date Mira last employed Claimant. (DX 15) Under § 725.495(d), when the operator designated as the responsible operator is not the operator that most recently employed the miner, the Director shall file a statement explaining the designation. If the reasons for the designation include the most recent employer's failure to meet the requirements of § 725.494(e), which relate to an operator being capable of assuming liability for the payment of benefits, the Director shall file a statement declaring it has searched all its files and that no record of insurance coverage or authorization to self-insure was found. If the Director provides such a statement as it did in this current claim, then the Director's statement "shall be prima facie evidence that the most recent employer is not financially capable of assuming liability for a claim." § 725.495(d). Employer argues that Mira is capable of assuming liability for the payment of benefits based on a Dun & Bradstreet report that shows Mira had sales of $3,000,000. (DX 15) However, this one report is not enough to overcome the Director's statement that Mira is financially unable to assume liability. Therefore, I find that Mira does not qualify as a potentially liable operator pursuant to § 725.491.

Under § 725.495(a)(3), if the operator that most recently employed the miner is not a potentially liable operator, then the responsible operator shall be the potentially liable operator that most recently employed the miner. In the instant claim, that would be B&M as Claimant owned and operated the company from 1978 to 1989, before leaving to work for Mira. To contest its status as the responsible operator, B&M must either prove that it does not possess sufficient assets to secure the payment of benefits or that it is not the potentially liable operator that most recently employed Claimant. §725.495(c). Although it did not provide any evidence contesting its ability to pay benefits, Employer did provide evidence asserting that Mira should be named the responsible operator as it was the potentially liable operator that most recently employed Claimant. However, as discussed above, Mira does not qualify as a potentially liable operator. Further, Mrs. Mullins, as an officer of B&M, accepted B&M's status as the responsible operator. (DX 23). Therefore, as B&M has failed to meet its burden of proving that it is not the responsible operator and has already accepted liability, I find that B&M is the responsible operator in the instant claim.

In naming B&M as the responsible operator in the instant claim, the Director also named American Mining as the responsible carrier. (DX 22) The Director argues that American Mining did not contest nor submit evidence concerning its status as the responsible carrier to the Director. (Dir.'s Br. at 2) In support of its argument, the Director stresses that B&M filed an acceptance of liability both for itself and American Mining. (Dir.'s Br. at 4; DX 23) However, the Director did not submit any evidence showing that Mrs. Mullins, who filed the acceptance of liability for B&M, had any authority to speak on behalf of American Mining. On March 2, 2004, American Mining filed on behalf of both itself and B&M a response contesting their status of being named the responsible operator and carrier. In that response, the coverage dates of American Mining's insurance policy were provided to the Director. Those dates were March 29, 1991 through April 1, 1992. The same coverage dates were submitted to the Director by Mrs. Mullins on December 8, 2003.[4] (DX 19) The Director was also provided with deposition testimony and answers to interrogatories from Claimant in which he stated that he stopped working for B&M in 1990. (DX 5 at 9, 22; EX 7; DX 6) Other evidence establishing that Claimant's employment with B&M ended in 1990 was Claimant CM-911(a) form and a letter from Mrs. Mullins to the Department of Labor dated March 8, 2004. (DX 3; DX 5 at EX 1) Further, Claimant's Social Security Earnings Records show Claimant last worked for B&M in 1990. (DX 8) Although American Mining failed to explicitly inform the Director that its policy for B&M did not cover any of the time Claimant was employed there, the Director was adequately put on notice that American Mining was not the proper responsible carrier. American Mining should not be penalized for the Director's failure to further investigate who the proper responsible carrier should be. Moreover, the Director's own records listing the insurance policies held by B&M show that American Resources Insurance Company, not American

[4] On October 25, 2005, Carrier submitted information pages from American Mining regarding the policies it had issued to B&M. I have marked this record as EX 5. The Director objected to the submission of this exhibit as the evidence was not submitted to the Director within 90 days after B&M had been provided with the Notice of Claim. The Director also objected to the submission of the exhibit as it was not provided to the parties within 20 days of the hearing. (Dir's Br. at 7) As EX 5 was not submitted in accordance with §§ 725.408(b)(1) and (b)(2) and §§ 725.456(b)(1) and (b)(2), respectively, as asserted by the Director, I will sustain the Director's objection and EX 5 is not admitted into evidence.

Mining, insured B&M from 1987 through 1991, which includes the periods of time in which Claimant was employed by B&M. Based on the above, I find that American Mining timely contested its status as the responsible operator and provided the Director with enough evidence to prove that it was not the responsible carrier. Therefore, I find that American Mining is not the responsible carrier in the instant claim.

E. Entitlement

Because this claim was filed after the effective date of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under Part 718 standards. § 718.2. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

F. Length of Coal Mine Employment

Claimant asserts that he has over 30 years of coal mine employment. (T 21) Employer is willing to stipulate that Claimant has established four years of coal mine employment. (T 7)

The regulations provide that, "to the extent the evidence permits, the beginning and ending dates of coal mine employment shall be ascertained." § 725.101(a)(32)(ii). Section 725.101(a)(32) provides that a "year" means: "a period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.'" § 725.101(a)(32). If the evidence establishes that the miner worked in coal mining at least 125 days during a calendar year, then the miner has worked one year in coal mine employment for all purposes under the Act. § 725.101(a)(32)(i).

A calculation of coal mine employment history must be based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. Clayton v. Pyro Mining Co., 7 B.L.R. 1-551 (1984); Schmidt v. Amax Coal Co., 7 B.L.R. 1-489 (1984). Social Security earnings records and coal mine employment forms submitted with the claim may constitute substantial evidence. Schmidt, 7 B.L.R. 1-489 (1984); Harkey v. Alabama By-Products Corp., 7 B.L.R. 1-26 (1984). When relying on these records, the Board has held that counting quarters in which the miner earned $50.00 or more, while not counting the quarters in which he earned less, is a reasonable method of computation. Tackett v. Director, OWCP, 6 B.L.R. 1-839 (1984). A calculation of coal mine employment history may also be based on Claimant's testimony where it is uncontradicted and credible. Gilliam v. G & O Coal Co., 7 B.L.R. 1-59 (1984).

Claimant testified at the hearing on October 20, 2005, and in deposition testimony taken on April 6, 2004, regarding his coal mine employment. Claimant testified that his first coal mine employment was working for his father hauling coal out of a strip pit from 1962 to 1964. (DX 5 at 7-8, T 11-12) Claimant testified that his next coal mine employment was as an

owner/operator of A-1 Coal Company, which bought and prepared coal. He worked at A-1 Coal Company from 1974 through 1978. (T 13; DX 5 at 8) Claimant testified that his next coal mine employment was from 1978 to 1990 as the owner/operator of B&M. (T 14; DX 5 at 9) His last coal mine employment was with Mira from 1990 until 2004. While at Mira he ran a loader and a crusher at the screening plant. (T 15-17; DX 5 at 14-15) Claimant's testimony is further supported by his Social Security Earnings records. Although his time of employment at B&M is listed as 1983 through 1990, the earnings records list him as self-employed from 1979 through 1983. (DX 8) Moreover, Employer did not offer any evidence disputing Claimant's testimony regarding his coal mine employment. I find Claimant's testimony regarding his coal mine employment history is credible.

Based on the forgoing, I calculate Claimant's coal mine employment history as follows.

Employment with father, 1962-1964	2 years
A-1 Coal Company, 1974-1978	4 years
Burleson & Mullins, 1989-1990	11 years
Mira Enterprises, 1990-2004	14 years
Total:	**31 years**

Accordingly, I credit Claimant with 31 years of coal mine employment.

G. Elements of Entitlement

1. Presence of Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at § 718.202(a)(1) through (a)(4):

(1) X-ray evidence. § 718.202(a)(1).

(2) Biopsy or autopsy evidence. § 718.202(a)(2).

(3) Regulatory presumptions. § 718.202(a)(3).

a) § 718.304 - Irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

b) § 718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

c) § 718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971.

(4) Physician's opinions based upon objective medical evidence § 718.202(a)(4).

X-ray evidence, § 718.202(a)(1)

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102. The current record contains the following chest X-ray evidence.[4]

DATE OF X-RAY	DATE READ	EX. NO.	PHYSICIAN	RADIOLOGICAL CREDENTIALS	I.L.O. CLASS
05/23/2003	05/30/2003	DX 11	Dr. Nath	BCR, B-reader	Negative
05/23/2003	08/26/2005	EX 1	Dr. Wheeler	BCR, B-reader	Negative
05/23/2003	08/29/2005	EX 2	Dr. Scott	BCR, B-reader	Negative

It is well-established that the interpretation of an X-ray by a B-reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983); Sharpless v. Califano, 585 F.2d 664, 666-7 (4th Cir. 1978). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a B-reader as well as a Board-certified radiologist may be given more weight than that of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). In addition, a judge is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The chest X-ray taken on May 23, 2003 was interpreted as negative by Drs. Nath, Wheeler, and Scott. Accordingly, I find that the chest X-ray is negative for the presence of pneumoconiosis.

Considering all of the X-ray evidence together, I find that the weight of the X-ray evidence does not support a finding of the presence of pneumoconiosis.

[4] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51. A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

Biopsy or autopsy evidence, § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

Regulatory presumptions, § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. § 718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physicians' opinions, § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth as follows in subparagraph (a)(4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.204(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." Section 718.201(a)(1) and (2) defines clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(b) states:

> [A] disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

As the physicians providing opinions regarding the presence of pneumoconiosis considered the laboratory studies, these are set forth below.

The record contains the pulmonary function study summarized below.

DATE	EX. NO.	PHYSICIAN	AGE	FEV_1	FVC	MVV	FEV_1/FVC	EFFORT	QUALIFIES
05/23/2003	DX 11	Dr. Khan	62	3.23 3.18*	4.47 4.24*	117 118*	72% 75%*	Good Good*	No No*

*post-bronchodilator

This study produced values that were nonqualifying under the regulations. § 718.204(b)(2)(i).

The record contains the arterial blood gas study summarized below.

DATE	EX. NO.	PHYSICIAN	PCO2	PO2	QUALIFIES
05/23/2003	DX 11	Dr. Khan	42 43*	80 84*	No No*

*post-exercise

An opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). A medical opinion that is undocumented or unreasoned may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989); see also Duke v. Director, OWCP, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis). A medical opinion is adequately documented if it is based on items such as a physical examination and an accurate smoking history and report of coal mine employment. See Perry v. Director, OWCP, 9 B.L.R.1-1 (1986).

The record contains the following physician's opinions.

Dr. Zakir N. Khan

Dr. Zakir N. Khan (Board-certified in internal medicine) examined Claimant on May 23, 2003, and issued a report dated June 2, 2003. The physician credited Claimant with 31 years of coal mine employment and considered a smoking history of 42 years at one pack of cigarettes a day and that Claimant stopped smoking in December 2002. Dr. Khan relied on his physical examination of Claimant, and a chest X-ray, pulmonary function test, arterial blood gas study, and electrocardiogram all dated May 23, 2003. The physician noted that Claimant's medical history was significant for coronary artery disease and hyperlipidemia and that he had recurrent hospitalizations for pneumonia. Dr. Khan also noted that Claimant reported some decrease in activity tolerance over the past two years. On physical examination, the physician found a few scattered wheezes on auscultation of Claimant's lungs but no other significant abnormalities were noted. Dr. Khan noted that Claimant's chest X-ray showed no significant abnormality and that his arterial blood gas study was normal. On Claimant's pulmonary function test, the physician found mild obstructive lung disease with moderate impaired membrane diffusion. Dr.

Khan diagnosed Claimant with chronic obstructive lung disease and coronary artery disease. The physician opined that the cause of Claimant's chronic obstructive lung disease was smoking and coal dust inhalation. (DX 11) I infer from this that Dr. Khan is of the opinion that Claimant has pneumoconiosis as defined by the Act. I find that Dr. Khan's opinion regarding the presence of pneumoconiosis is reasoned and well-documented.

Dr. Gregory J. Fino

Dr. Gregory J. Fino (Board-certified in internal medicine and pulmonary disease) reviewed Claimant's medical records at the behest of Employer and issued a report dated September 22, 2005. The physician credited Claimant with 35 years of coal mine employment and considered a smoking history of 42 years at one pack of cigarettes a day and that Claimant stopped smoking in 2002. Dr. Fino reviewed Claimant's 2003 application for benefits, hospital admission records dated August 3, 1982 through August 6, 1982 and August 25, 1988 through August 27, 1988, emergency room reports dated November 9, 1989 and June 15, 1992, a pre-operative examination report dated June 14, 1994, Dr. Owen's office records dated March 17, 1999 through September 13, 2001, hospital admission records dated December 13, 2001 through December 14, 2001, Dr. Khan's report dated May 23, 2003, hospital admission records dated August 7, 2003 through August 12, 2003, the transcript from Claimant's deposition taken on April 6, 2004, and two Department of Labor court transcripts filed in 2004. Dr. Fino opined that Claimant does not have pneumoconiosis. In coming to that conclusion, the physician noted that Claimant's May 23, 2003 chest X-ray was negative for pneumoconiosis. Dr. Fino also found that Claimant's pulmonary function test was normal showing no obstruction, restriction, or ventilatory impairment. The physician noted that Dr. Khan had found the pulmonary function test to show a mild obstruction, but Dr. Fino explained that even assuming a mild obstruction was present, the values of the FEV_1, FVC, and MVV showed no impairment or disability. The physician also noted that Claimant's diffusing capacity on his arterial blood gas study was significantly reduced, which presented the possibility of a significant oxygen transfer abnormality, however, Dr. Fino explained that the normal exercise study ruled out such a possibility. The physician also noted that Claimant did not show any impairment in oxygen transfer as he did not experience hypoxemia on the exercise portion of his arterial blood gas study. (EX 3) I find that Dr. Fino's opinion that Claimant does not have pneumoconiosis is reasoned and well-documented.

Dr. Khan and Dr. Fino presented opposing opinions that were reasoned and well-documented. Dr. Khan found the presence of pneumoconiosis based on his physical examination of Claimant and the finding of a mild obstruction on Claimant's pulmonary function test. Dr. Fino opined that Claimant did not have pneumoconiosis based on the absence of disease on chest X-ray and that Claimant's pulmonary function test, even if a mild obstruction was present, did not show any impairment or disability. Dr. Khan's opinion can be afforded greater weight as he conducted a physical examination of Claimant, whereas Dr. Fino only reviewed medical records. However, Dr. Fino's opinion can be afforded greater weight as he more fully explained the basis of his conclusion. Based on the above, I find that the medical opinion evidence regarding the presence of pneumoconiosis is in equipoise.

As noted above, the chest X-ray evidence does not support a finding of the presence of pneumoconiosis. The medical opinion evidence is in equipoise regarding the presence of pneumoconiosis. Weighing all of the evidence together and considering that Claimant bears the burden of proving his entitlement, I find that Claimant has failed to establish the presence of pneumoconiosis.

2. Pneumoconiosis Arising Out of Coal Mine Employment

As Claimant has failed to establish the presence of pneumoconiosis under § 718.202(a), Claimant cannot establish pneumoconiosis arising out of coal mine employment under § 718.203.

3. Total Disability

Claimant must establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) provides as follows:

> [A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner
>
> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment . . . in a mine or mines . . .

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); see also, Beatty v. Danri Corp., 16 B.L.R. 1-1 (1991), aff'd as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993 (3d Cir. 1995).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i-iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

In order to establish total disability through pulmonary function tests, the FEV_1 must be equal to or less than the values listed in Table B1 of Appendix B to this part and, in addition, the tests must also reveal either: (1) values equal to or less than those listed in Table B3 for the FVC test, or (2) values equal to or less than those listed in Table B5 for the MVV test or, (3) a percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC

tests. § 718.204(b)(2)(i)(A-C). Such studies are designated as "qualifying" under the regulations. Assessment of pulmonary function study results is dependent on Claimant's height, which was noted to be 72.25 inches. I therefore used that height in evaluating the studies. Protopappas v. Director, OWCP, 6 B.L.R. 1-221 (1983).

As discussed above, the May 23, 2003 pulmonary function study produced nonqualifying results. Consequently, I find that the pulmonary function study evidence does not support a finding of total disability pursuant to § 718.204(b)(2)(i).

The May 23, 2003 blood gas study also did not yield qualifying results. Based on the foregoing, Claimant has not established total disability under the provisions of § 718.204(b)(2)(ii).

Under § 718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure.

The remaining means of establishing total disability is with the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. § 718.204(b)(2)(iv).

The record contains the following medical opinions.

Dr. Khan opined that Claimant would have a moderate impairment in performing his last coal mining job. I infer from this that Dr. Khan is of the opinion that Claimant is not totally disabled. In coming to this conclusion, the physician relied on his physical examination of Claimant, and a chest X-ray, pulmonary function test, arterial blood gas study, and electrocardiogram all dated May 23, 2003. On physical examination, the physician found a few scattered wheezes on auscultation of Claimant's lungs but no other significant abnormalities were noted. Dr. Khan noted that Claimant's arterial blood gas study was normal. The physician also noted that Claimant's pulmonary function test showed mild obstructive lung disease with moderate impaired membrane diffusion. (DX 11) I find that Dr. Khan's opinion that Claimant is not totally disabled is reasoned and well-documented.

Dr. Fino opined that Claimant is neither partially nor totally disabled and he would be able to perform all the requirements of his last coal mine job. In coming to that conclusion, the physician reviewed Claimant's 2003 application for benefits, hospital admission records dated August 3, 1982 through August 6, 1982 and August 25, 1988 through August 27, 1988, emergency room reports dated November 9, 1989 and June 15, 1992, a pre-operative examination report dated June 14, 1994, Dr. Owen's office records dated March 17, 1999 through September 13, 2001, hospital admission records dated December 13, 2001 through December 14, 2001, Dr. Khan's report dated May 23, 2003, hospital admission records dated August 7, 2003 through August 12, 2003, the transcript from Claimant's deposition taken on

April 6, 2004, and two Department of Labor court transcripts filed in 2004. Dr. Fino noted that Claimant's pulmonary function test showed no evidence of obstruction, restriction, ventilatory impairment. The physician also noted that Claimant's arterial blood gas study showed no significant hypoxemia or impairment in oxygen transfer at rest or with exercise. (EX 3) I find that Dr. Fino's opinion that Claimant is not totally disabled is reasoned and well-documented.

Based on the above, I find that the medical opinion evidence does not support a finding of total disability.

As previously noted, the pulmonary function test and arterial blood gas study do not establish total disability. The medical opinion evidence also fails to establish total disability. Based on the forgoing, Claimant has not established this element of entitlement.

4. Total Disability Due to Pneumoconiosis

As Claimant has failed to establish the presence of pneumoconiosis under § 718.202(a) and total disability under § 718.204(b)(2), Claimant cannot establish total disability due to pneumoconiosis under § 718.204(c)(2).

H. Conclusion

As Claimant has not established any elements of entitlement, the claim must be denied.

ORDER

The claim of CHARLES D. MULLINS for benefits under the Act is DENIED.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence

establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).